

ESTTA Tracking number: **ESTTA1143329**

Filing date: **06/28/2021**

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	92067794
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Date	06/28/2021
Attachments	Ps-Reply-Brief.pdf(514769 bytes)

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

In the Matter of Reg. Nos. 2,207,535 and 3,598,502

Mark: FORUM

Joshua S. Schoonover,)	
)	
Petitioner,)	
)	Cancellation No.: 92067794 (parent)
vs)	
)	Cancellation No. 92069499
The Burton Corporation,)	
)	
Registrant,)	

PETITIONER’S REPLY BRIEF ON THE MERITS

Petitioner, Joshua S. Schoonover (“Petitioner”), files its Reply Brief on the Merits in response to the Trial Brief filed by Registrant, The Burton Corporation (“Registrant”), in the above-referenced proceeding (parent).

Dated: June 28, 2021

Respectfully submitted,

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INTRODUCTION

The brief on the merits filed by Registrant, The Burton Corporation (63 TTABVUE (public) / 64 TTABVUE (confidential), is a superficial and unsupported attempt to ignore what is obvious. First, on the date of the Burton Press Release (see at least 24 TTABVUE 19-23, hereinafter “the Burton Press Release”), namely October 23, 2012, Registrant objectively manifested an intent to “transition out of” and eventually “**exit out of**” the Program Brands (including the FORUM brand and the FORUM marks that are the subject of this proceeding) [emphasis added]. Also on October 23, 2012, the Registrant’s intent, as explicitly provided in the Burton Press Release, was clarified by Registrant’s CEO at the time, Jake Burton, who said to TransWorld Business “[We will] probably... put them to bed. I don't see us selling them. I think we will retain the trademarks should anything ever develop in the future.” (see at least 27 TTABVUE 53, 27 TTABVUE 64). The TransWorld Business interview was confirmed by ESPN (see at least 24 TTABVUE 17, 27 TTABVUE 43). Registrant’s own witness, Mark Wakeling, also confirmed the intent manifested in the Burton Press Release in his cross examination, where Mr. Wakeling states “that was the position I discussed with [Jake Burton] at the time.” (55 TTABVUE 34:8 through 34:17 (confidential) / 58 TTABVUE 34:8 through 34:17(public filing)). Moreover, after the Burton Press Release a number of affirmative acts and omissions on part of Registrant further corroborate the Registrant’s intent to exit out of the FORUM mark, namely: closing the FORUM headquarters in California (27 TTABVUE 52), laying off employees working the FORUM brand (55 TTABVUE 28:11-15, 33:18-20 (confidential) / 58 TTABVUE 28:11-15, 33:18-20 (public filing)), terminating athlete sponsor deals under the FORUM marks (25 TTABVUE 16 (RFA 27)), ceasing marketing efforts under the FORUM marks on social media, including Facebook (27 TTABVUE 83-85; 25 TTABVUE 12-13 (RFA 13-15)), Instagram (27 TTABVUE 91-93; 25 TTABVUE 14-15 (RFA 19-21)), and Twitter (27 TTABVUE 87-89; 25 TTABVUE 13-14 (RFA 16-18)), discontinuing the marketing of FORUM product at trade shows (25 TTABVUE 17 (RFA 30)), ceasing the manufacture of FORUM product until a token revival in 2018 only after institution of this proceeding (36 TTABVUE 4; 55 TTABVUE 21:14 through 22:3 (confidential) / 58 TTABVUE 21:14 through 22:3 (public filing)), and substantially discounting closeout FORUM product as high as 83% off

wholesale price to liquidate and dispose of existing FORUM product (55 TTABVUE 18:21 through 19:8, and 89 (confidential) / 58 TTABVUE 18:21 through 19:8, and 89 (public filing)). Accordingly, the evidence makes overwhelmingly clear what was the intent of Registrant on and after October 23, 2012, and that is to completely sell off existing inventory and wind down to the point of permanently exiting out of the FORUM marks by ceasing all use of the FORUM marks in commerce. It is no mistake that in its public statements - Registrant used the phrase “exit out of” the Program Brands (including FORUM), which signifies a permanent end, as opposed to a temporary suspension.

As for nonuse, Petitioner, in its Opening Trial Brief, has made an argument that once Registrant manifested its intent to “transition out of” and ultimately to “exit out of” the FORUM mark, any subsequent use of the FORUM mark by Registrant was merely “winding down,” which is not the type of use consistent with the “ordinary course of trade.” Simply stated, the ordinary course of trade in the action sports apparel, outerwear and hard goods space is to build and maintain a brand so as to not lose credibility amongst the purchasing public in a very competitive industry. It is not within the ordinary course of trade to stop designing, making, marketing and offering new product; such would be equivalent to brand suicide. Registrant alleges Petitioner’s remarks concerning “winding down” lack a factual and legal basis (63 TTABVUE 15). However, this is not true. As for a factual basis, all three of Registrant’s invoices presented in the record list a purchase order “PO” number indicating they are “closeout” sales; ex: “PYCO” means prior year closeout, or otherwise were confirmed to be liquidation, closeout, or “winding down” sales (58 TTABVUE). Specifically, Mark Wakeling confirmed these were for closeout, “old product” and/or are liquidation sales. (58 TTABVUE, see at least 10:22, 13:16-17, and 17:21). As for legal basis, Petitioner references the applicable statute: [t]he term “use in commerce” means the *bona fide* use of a mark in the ordinary course of trade, and not made merely to reserve a right in a mark (15 U.S.C. 1127). In the action sports apparel and hard goods industry, the normal course of trade involves designing samples of new product, making new product for each season, promoting the new product each season through marketing efforts, including athlete sponsorships, trade show events, social media, and the like. Absent continued marketing efforts and new product each season, the brand becomes obsolete and loses market credibility

and eventually loses sales. Thus, when Registrant ceased all such design, manufacturing, and marketing efforts, it made an affirmative step toward abandoning the FORUM marks, consistent with its manifested intent in the Burton Press Release and elsewhere as evidenced in the record. Such cessation of design, manufacturing and marketing efforts is inconsistent with use of a mark in the normal course of trade considering the field being action sports apparel and hard goods. In contrast, for example in the movie industry, it may be reasonable to release a movie product every four years or so, such as a Star Wars sequel. However, in the action sports apparel and hard goods industry, the timing is seasonal and regular and affirmative use in the ordinary course of trade occurs each winter, in order to remain relevant to consumers. For all of these reasons, absent continued design, manufacturing and marketing efforts consistent with the ordinary course of trade, the post- October 23, 2012 use of the FORUM mark as demonstrated in the record is merely “winding down” because no new product was designed, manufactured, marketed or sold after that date (only old product was sold, with no marketing that would be consistent with the ordinary course of trade). It is agreed that Registrant sold goods after October 23, 2012, but it is Petitioner’s position that all sales after October 23, 2012 were merely winding down and not amounting to *bona fide* use of the FORUM marks because there were no efforts to design, manufacture, market, or sell new product consistent with the normal course of trade. Except maybe in March 2018 with the *de minimis* sale of snowboards, which is a futile attempt to re-establish use of the FORUM mark as discussed *infra*. Therefore, it is Petitioner’s first position that Registrant’s period of nonuse, being a period of no *bona fide* use consistent with the ordinary course of trade, began on October 23, 2012.

In a first alternative position regarding nonuse, Petitioner argues in its Opening Trial Brief that Registrant certainly had no *bona fide* sales after winter 2014, or January 25, 2014 (the last Saturday of January in 2014 according to the end of Registrant’s 2014 Fiscal Year, 56 TTABVue 12:1-3). In the seasonal business of snowboarding apparel, outerwear and snowboard hardgoods, product samples are made more than a year prior to product release, product is ordered for manufacturing about a year prior to product release (typically by December of the prior year), and product is delivered to wholesalers/retailers by September prior to winter season. Registrant provided testimony during the cross examination of Mark

Wakeling that it had, prior to the Burton Press Release of October 23, 2012, produced samples and commenced the manufacturing of goods to arrive by September of 2013 for distribution and sale during the winter 2014 season (ends January 25, 2014).(58 TTABVUE 29:9). This in mind, even though the Registrant's intent was to exit out of the FORUM mark prior to winter 2014, Petitioner stipulates that the record appears to support that FORUM product was designed, manufactured, and marketed at least until October 23, 2012, and sold through the winter 2014 season (i.e. January 25, 2014). Therefore, depending on how the Board treats the Registrant's actions between October 23, 2012 (The Burton Press Release) and January 25, 2014 (end of winter 2014 Fiscal Year) as presented in the record, it is disputed but possible that the Board might find that Registrant acted to use the FORUM marks in the normal course of trade through winter 2014; i.e. January 25, 2014. The Burton Press Release does indicate that FORUM product will be supported through winter 2014. Therefore, it is Petitioner's second position that Registrant's period of nonuse, being a period of no *bona fide* use consistent with the ordinary course of trade, began January 25, 2014, after which no new product was designed, manufactured, marketed, or sold. The key difference with Petitioner's first position, *supra*, is that Registrant had already developed a winter 2014 product line, and at the time of the Burton Press Release, that winter 2014 product was in process, so even though the intent was to exit out of the FORUM brand that product cycle in winter 2014 appears it may have been completed.

In a second alternative position as described in Petitioner's Opening Trial Brief, giving Registrant the benefit of every doubt and treating the record in a light most favorable to Registrant, it is Petitioner's argument that the last of Registrant's sales supported by evidence in the record occurred on February 26, 2015 (Burton Fiscal Year 2016 because this sale occurred after the last Saturday in January 2015) as a sale to The Sound Barrier (36 TTABVUE 19-21). Therefore, it is Petitioner's third position that Registrant's period of nonuse, being a period beginning after the last of all documented and verifiable sales in the record, begins on February 26, 2015 with the sale to The Sound Barrier. Indeed, Mark Wakeling confirms in his cross-examination testimony that Registrant had no sales after the February 26, 2015 Invoice to The Sound Barrier, and at least until a subsequent deal for a *de minimis* number of snowboards occurring as early as March 29, 2018 (58 TTABVUE 21: 9-13). Mark Wakeling is described by Registrant as having "oversight

of the FORUM brand” between September 2011 and May 2018 (63 TTABVUE 13), and surely he would know if there were any sales by Registrant of FORUM product between February 26, 2015 and March 29, 2018; but according to the record, Mr. Wakeling is aware of no such sales.

On or about March 29, 2018, Mark Wakeling corresponded by email to The House to inquire about a sale of snowboards. (36 TTABVUE 4). This particular sale was for a *de minimis* volume of 100 snowboards (58 TTABVUE 21:20-22), and was not offered in the ordinary course of trade because it was a special offer, to one client, not generally open to Registrant’s customer base or snowboard shops generally, but to a friendly affiliate that liquidates Registrant’s inventory. A sale in the ordinary course of trade would have involved designing new product, marketing the new product, and selling through usual trade channels. However, it is noted that the two snowboard models alleged to be sold in this particular transaction were of an old design, even the artwork was recycled, and were not new product in the sense of design but rather were a remanufacture of an old style snowboard (41 TTABVUE 25-26, and 33-34). Also, the sales inquiry occurred about a week after the discovery conference in this proceeding, which suggests this sales inquiry was a result of this cancellation proceeding and the Registrant attempting to re-establish use of the FORUM mark, albeit after abandonment. The evidence surrounding this *de minimis* and token sale suggests the sale was manufactured to re-establish use of the FORUM mark and not to use the mark in a manner consistent with the ordinary course of trade. Moreover, a review of the public comments in Registrant’s evidence is indicative of the public’s perception as to whether Burton ceased use of FORUM with intent not to resume use, such as “R.I.P. Forum” (41 TTABVUE 18), “I thought Forum was shutdown...” (41 TTABVUE 26), and “RIP Forum!” (41 TTABVUE 50).

However, even if the Board credits Registrant with the *de minimis* sale of snowboards to the House in winter 2019 (as early as March 29, 2018), the period of nonuse begins either October 23, 2012, January 25, 2015, or February 26, 2015, and extends to as early as March 29, 2018, which, by any math, is more than three years of nonuse and a *prima facie* case of abandonment is established.

Finally, Petitioner respectfully submits that three years of nonuse is not required for a finding of abandonment. It is enough that Registrant (i) objectively manifested an intent to abandon use of the

FORUM marks, to “transition out of” (during a winding down period), and eventually, after selling off existing inventory, to permanently “exit out of” the FORUM brand, and that Registrant (ii) took affirmative steps in furtherance of that intent to permanently exit out of the FORUM brand, namely ceasing *bona fide* use of the mark in the ordinary course of trade. Intent is clear in this matter when considering the statements in the Burton Press Release, the statements then CEO for Registrant, Jake Burton, made to TransWorld Business (confirmed by ESPN), the confirmation of such intent by Mark Wakeling, as well as the acts that Registrant made in furtherance of that intent; i.e. closing the FORUM headquarters in California, laying off employees working the FORUM brand, terminating athlete sponsor deals under the FORUM marks, ceasing marketing efforts under the FORUM marks on social media, including, Facebook, Instagram, and Twitter, discontinuing the marketing of FORUM product at trade shows, ceasing the manufacture of FORUM product until a token revival in winter 2019, and substantially discounting closeout FORUM product as high as 83% off wholesale price to wind down and dispose of product bearing the FORUM brand.

In rebuttal, Registrant alleges sales in other countries, and two failed licensing transactions, as a basis of nonuse.

Foreign (non-U.S) Sales Insufficient to Rebut Prima Facie Abandonment

First, Registrant has offered no documentary evidence of foreign sales other than statements of its personnel and documents Burton itself has manufactured. This amounts to no more than a statement in a pleading alleging “we had foreign sales, here look at the excel spreadsheet we made that says so!” Registrant relies on a list of alleged sales, generated internally by Registrant, with no copies of invoices or other documents, such as canceled checks or payment verifications. Registrant represented that it had, at least as of May 17, 2019, provided all documents concerning manufacture and sale of goods bearing the FORUM mark that are/were in Registrant’s possession. (25 TTABVUE 25, RFA 55). Yet, Registrant failed to provide any such documentary evidence in discovery, such as copies of invoices or canceled payments or any other evidence of the alleged foreign sales. Indeed, Registrant failed to establish any such evidence in the record. All we have is the word of Registrant without any corroboration. Because Registrant was asked, and had a duty to produce such documents, yet did not produce any such documents, we must treat such

omissions as tending to prove that there were no foreign sales! In fact, the documents manufactured by Registrant do not even indicate that FORUM product was sold, as opposed to BURTON or other product! There simply is no credible evidence of any foreign sales. Further, Registrant represented such sales as occurring outside of the United States, from Registrant's foreign affiliates, and are therefore not material to use of a mark in the US. Furthermore, even looking at Registrant's own evidence, the sales are significantly winding down even as represented in these foreign markets, year over year, which tends to support Registrant's global abandonment of the FORUM marks. (See Decl. Steven Cooley 33 TTABVUE, 37 TTABVUE). While this tribunal is only charged with domestic trademark rights, it is noteworthy to review that Registrant's sales have ceased even in foreign markets after The Burton Press Release. The internally manufactured documents alleging foreign sales that are provided by Registrant should be given little or no weight as they are not verifiable or supported by corroborating evidence, and because Registrant failed to participate during discovery to provide or supplement any corroborating evidence of such sales. Additionally, these are winding down sales, consistent with the Burton Press Release and evidenced by major declining numbers year over year as suggested by Registrant. Moreover, these are of Registrant's foreign affiliates and there is no evidence that such sales originated from within the United States. To this end, Registrant repeatedly offers sales of others as its own sales; for example, it produced website screenshots of closeout FORUM product sold by The House and attempts to show these as its own sales. (41 TTABVUE). Neither the closeout sales alleged to be offered by Registrant's foreign affiliates, or those of its domestic liquidators, should benefit Registrant as Registrant's own use of the FORUM marks.

Two Failed Licensing Transactions Insufficient to Rebut Prima Facie Abandonment

Registrant alleges that its alleged licensing discussions are consistent with use of the FORUM mark. However, this fails because (i) Registrant made no active and affirmative step to license the FORUM mark, (ii) did not license the FORUM mark, and (iii) at least one of the alleged licensing discussions is directed to foreign trademark rights and not the registrations that are subject of this proceeding.

First, both of the two alleged licensing discussions offered by Registrant were passive, that is, were originated from a third-party, and were not a legitimate attempt by Registrant to actually enter into any

trademark license agreement. Registrant was approached for a licensing deal, middle management for Registrant assembled the particulars of each offer and presented to upper management, and upper management declined in each instance (See decl. Mark Wakeling, 36 TTABVUE and exhibits). No license agreement was reached. Again, according to Jake Burton in 2012 “[We will] probably... put them to bed. I don't see us selling them. I think we will retain the trademarks should anything ever develop in the future.” (27 TTABVUE 53, 27 TTABVUE 64). The passive receipt of an offer to license trademark rights, without entering into a licensing agreement, is not the type of activity that equates to *bona fide* use in the ordinary course of business because Registrant was not actively seeking a license. If, however, Registrant itself prepared, planned and sought to license trademark rights, that might be a different situation; however, this is not what happened in this matter. Registrant received offers, solicitations actually, by third-party entities seeking to license the trademark rights to the FORUM mark, and Registrant declined. There is no evidence that Registrant actively and affirmatively planned, prepared, sought, or entered into any licensing agreement related the FORUM mark. For this reason, the specific conduct by Registrant concerning the alleged trademark licensing discussions does not amount to *bona fide* use consistent with the ordinary course of trade, and therefore does not rebut the *prima facie* case of abandonment established by Petitioner.

Registrant Admits it Was Not Engaged in *bona fide* Use after February 26, 2015

In its Trial Brief, Registrant admits that it engaged in *bona fide* use in commerce of the FORUM Marks “**as late as February 26, 2015**” [emphasis added]. (63 TTABVUE last sentence page 17-18). Thus, possibly prior to, but certainly after February 26, 2015, Registrant admittedly was NOT engaged in *bona fide* use in commerce of the FORUM marks.

Registrant’s Three Invoice Examples are “Winding Down Sales”

In its Trial Brief, Registrant emphasizes that Exhibits 1, 2, and 3 to the testimony declaration of Mark Wakeling (36 TTABVUE) are “just three representative examples of numerous sales of FORUM products during Burton’s fiscal years 2013 through 2017...” (63 TTABVUE 14-15). While technically accurate, these Exhibits are also the last three of all U.S. sales Registrants alleges in connection with its manufactured documents (other than the token sale of snowboards in winter 2019), and therefore the only

material sales, as anything before these sales is merely cumulative of prior use (does not establish a later date beginning nonuse). These are all “winding down” sales, as they are all prior year product closeouts, aged inventory, and odd number quantities, *supra*.

Registrant Attempts to Confuse by Reciting Fiscal Years Instead of Calendar Years

The Board should be cautious to differentiate calendar years versus Registrant’s Fiscal Year. Registrant often attempts to confuse the record by using its Fiscal Year instead of the actual calendar year of an event. For example, as referenced in Registrant’s Trial Brief, Steven Cooley provides a table summarizing Registrant’s sales; however, those sales are in terms of Fiscal Years, and representing a sale in 2016 that actually occurred on February 26, 2015.

Registrant Alleges Failure of Petitioner’s Pleadings

In its Trial Brief, Registrant suggests Petitioner failed to establish three years of nonuse as of the date the Petition was filed. First, the Petition alleges, “[o]n information and belief, Registrant has abandoned and discontinued use of the ... FORUM marks in commerce for more than three years, such abandonment was made with the intent to not use and to not resume use of the ... FORUM marks...” (1 TTABVUE 5, item 11). Similarly, in the counterpart Petition, Petitioner alleges a similar claim. No dates were proposed in the pleadings as establishing three years of non-use, nor are dates required. Petitioner is obligated only to give sufficient information to identify the issues, not to spell out its entire confidential legal strategy. The Petitioner’s pleadings are sufficient to place Registrant on notice regarding the issues in the proceeding.

Petitioner’s Recitation of October 12, 2012 vs. October 23, 2012

Registrant has identified a typographical error in Petitioner’s Opening Trial Brief, in which Petitioner referenced the date of the Burton Press Release, and the date of the Jake Burton TransWorld Business interview, each as October 12, 2012. This error was populated throughout Petitioner’s Opening Trial Brief five (5) times. A review of the record indicates that the date should have been October 23, 2012 in each instance. Petitioner respectfully requests all reviewers of this matter to treat any reference to October 12, 2012 by Petitioner in Petitioner’s Opening Trial Brief to read as October 23, 2012.

Petitioner’s References to TTABVUE

For clarity, unless explicitly directed otherwise, all references in Petitioner's Opening Trial Brief and this Reply Brief are made to Cancellation No. 92067794 (parent).

FORUM Marks in Two Registrations

As previously presented by Petitioner in the Motion to Consolidate, the facts and evidence related to the FORUM mark in Reg. Nos. 2,207,535 and 3,598,502 are substantially similar. The former registration being directed to class IC 028, and the latter to class IC 025. The only difference is that Registrant offered a token sale of snowboards in winter 2019 (as early as March 29, 2018), which relates only to Reg. No. 2,207,535. Registrant made no sales of apparel or outerwear after February 26, 2015. Other than that, Registrant is correct to understand that Petitioner believes the same record evidence warrants cancellation of both marks.

Registrant Erroneously Relies on Double Coin Holdings, Ltd. v. Tru Dev., No. Cancellation 92063808, 2019 WL 4877349, at *15, *18 (TTAB 2019)

In its Trial Brief, Registrant cites Double Coin Holdings as “stating that “[f]rom May 2014 to April 2015, CMA sold out and exhausted its inventory of WARRIOR passenger car and light truck tires originating from Double Coin in China” and that, as a result, the petitioner failed to show three consecutive years of nonuse between April 16, 2015 and early 2018”. 63 TTABVUE 16. However, this is erroneous, since, the facts in Double Coin Holdings are about a tire company being unable to sell tires due to imposed tariffs, rendering the importation of tires impractical, which tariffs are an external force, arising not from the tire company's volition, and therefore not a willful cessation of use of the mark in the subject market (USA). This proceeding is different because nonuse was not the result of a tariff or any external force that is not the volition of the Registrant, but in contrast, nonuse of the Program Brands, including the FORUM marks, is a result of Registrants unilateral and specific intent to “transition out of” and eventually to permanently “exit out of” the same. Indeed, the statute at 15 U.S.C. 1127 specifically and very clearly recites that [t]he term “use in commerce” means the *bona fide* use of a mark in the ordinary course of trade, and not made merely to reserve a right in a mark. Here, Registrant clearly indicates its intent in permanently exiting out of the Program Brands, including the FORUM marks, is to “better focus on and invest in

Burton”, and to “maintain the trademarks in case anything ever develops in the future”. The problem is, one cannot simply maintain the trademarks without *bona fide* use in the ordinary course of trade. That is what this case is all about.

CONCLUSION

Most persons having an interest in snowboarding circa 2012 remember FORUM snowboards and that day Burton announced the death of the Program Brands: FORUM, FOURSQUARE and SPECIAL BLEND. Registrant published its objective manifestation of intent to kill off FORUM and to abandon its production, but to merely preserve its trademark rights (according to Jake Burton and Mark Wakeling). Why? Because FORUM had a following, and every FORUM product sold would be one less potential Burton product sold. Burton purchased the Program Brands to acquire its customer base, then when the customers were converted, Burton decided to feed them exclusively Burton product (to better focus on and invest in Burton). In doing so, Registrant decided to stop designing, manufacturing, marketing, and selling the Program Brands, including FORUM. It wasn't until a relatively young attorney and avid snowboarding enthusiast, eventually teaming up with, among others, a former FORUM-riding professional athlete in the prospective re-launch of a brand killed off by its former owner, that a disgruntled Burton decided to falsely represent that it had no intent to abandon the FORUM , and to disingenuously manufacture a *de minimis* 100 snowboard sale to its friends at the liquidation company in attempt to evidence its intent to revive FORUM. Anyone can do a web search for “forum snowboards R.I.P.,” “no more forum snowboards,” or “forum snowboards gone” and find the truth, that Burton intentionally abandoned these marks with intent to not resume use. With such overwhelming and uncontroverted evidence as presented in the record, there is only one way for the Board to decide, that is to sustain the Petition in favor of Petitioner, and to cancel the subject registrations. Petitioner respectfully requests careful consideration and a favorable decision in his favor.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and accurate copy of PETITIONER’S REPLY BRIEF ON THE MERITS has this 28th day of June 2021 been delivered via email only to the below-identified Attorney/Correspondent for the Respondent:

tmip@drm.com

By: /Joshua S. Schoonover/

Joshua S. Schoonover